Supreme Court, U.S.
FILED
MAY 15 2003
OFFICE OF THE CLERK

(5)

No. 02-1507

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT,

Respondent.

On Petition for Writ Of Certiorari To
The Supreme Court of New Hampshire

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Liability for a Fifth Amendment Taking:** When a state's highest court declares a growth control regulation "invalid *ab initio,*" but a town had enforced that illegal regulation in excess of its police powers against a specific piece of property, is the town liable to the affected property owner for a taking because it has failed to "substantially advance legitimate state interests"? (*Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

2. **Liability for a Fifth Amendment Taking:** Alternatively, when a state's highest court declares a growth control regulation "invalid *ab initio*" but a town had enforced that regulation against a specific piece of property, should that illegal municipal conduct be considered under the "character of government action" factor set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), as one element to determine whether the town is liable for a taking?

3. **Remedy for a Fifth Amendment Taking:** Does the "self-executing character" of the Takings Clause compel the payment of "just compensation" to an aggrieved property owner for the time period in which a growth control regulation, declared "invalid *ab initio*" by a state's highest court, was enforced against a specific piece of property? (*First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987)).

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Petitioners Henry Torromeo and MDR Corporation respectfully file this Reply to the Brief in Opposition ("Opp. Br.") of Respondent Town of Fremont (the "Town").

The Town argues that *certiorari* should not be granted for three reasons. Each lacks merit.

1. The Town's Argument, that the Invalid Growth Control Ordinance was Never Challenged on a Constitutional Basis but was Merely Procedurally Defective, is Meritless.

To dissuade this Court from granting *certiorari,* the Town argues that "this is not a case where the Growth Control Ordinance was challenged on constitutional grounds." Opp. Br. at 2. The Town is wrong. Petitioner argued in the New Hampshire courts that the illegal Ordinance was "unconstitutional per se" because it was "invalid, *ab initio.*" (App. 3)

In any event, when the New Hampshire Supreme Court ruled that liability to pay just compensation depends on a finding that "the ordinance is unconstitutional and constitutes a taking" (App. 6), it misconstrued the Fifth Amendment and this Court's cases for two reasons. First, even constitutional or otherwise valid laws can trigger takings liability when they are applied and "go too far." See *Brown v. Legal Found. of Washington,* 538 U.S. ---, 123 S.Ct. 1406, 1417 (2003) (one of the "conditions" imposed by the Fifth Amendment is that a taking must be for a valid "public use"). Second, this Court has never hinged takings liability on the constitutionality of an ordinance *itself,* but rather typically conducts a takings analysis on an as-applied, ad hoc basis. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 535 U.S. 302, 320 (2002) (takings claimants face a steep "uphill battle"

in arguing that the "mere enactment" of a law is *per se* unconstitutional); *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 ((1985) ("the mere assertion of regulatory jurisdiction does not constitute a regulatory taking").

To further impede this Court's review, the Town insists that "[n]othing in the Court's taking jurisprudence suggests that a procedural defect in the adoption of a growth control ordinance...gives rise to takings liability." Opp. Br. at 4. We take strong issue with the Town's characterization that the illegal Ordinance suffered from an innocuous procedural defect,[1] and its reasoning provides no help. Nothing in this Court's jurisprudence even hints that enforcement of a law that fails to satisfy mandated legislative requirements *absolves* a municipality from takings liability.

A landowner would be audacious to suggest that his good faith but "merely procedural" non-compliance with land-use regulations must be ignored and forgiven. Yet here, where the Town conveniently acts as both player *and* referee, it seeks Fifth Amendment sanctuary for what it deems a procedural technicality in adopting and enforcing a law that derogates mandated legislative requirements. "Men must turn square corners when they deal with the Government." *Rock Island, A. & L.R. Co. v. United States,* 254 U.S. 141, 143 (1920) (Holmes, J.). That rule must be recipricol; government, too, must turn square corners when it regulates property, or else it runs the risk

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[1]In truth, the Town illegally adopted a growth control ordinance, deprived its citizens an opportunity to be heard on the important issue of growth management, and proceeded to enforce that invalid law against Petitioners. See Pet. 6-7. The illegality was so egregious that the New Hampshire courts found the Ordinance "invalid, *ab initio.*" See Pet. 7-8. These facts are uncontested, and we find it curious that Respondent ignored them entirely when it decided to restate the Questions Presented. See Opp. Br. at i.

of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). Just as there is no "merely procedural" exception to excuse a builder's non-compliance with land-use restrictions, there can be no "merely procedural" exception allowing government to execute an end-run around the Takings Clause.

In the end, it matters little to a property owner whether the government takes his land by applying a substantively unconstitutional law, or one that is "merely" defective procedurally. It is "*the effects produced* by a particular regulation [that] inform the takings analysis" (*Palazzolo v. Rhode Island,* 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasis supplied)—not whether government committed a mistake. And this reasoning is correct, because "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a governmental benefit." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 (1987).

In short, the Town's failure to follow mandatory statutory procedures is no reason to allow it to escape the Takings Clause.

2. The Court Must Grant Certiorari to Clarify Whether Landowners Must Litigate the Validity of a Land-Use Regulation First, Before Government Action can be Considered a Fifth Amendment Taking.

To dissuade this Court from granting *certiorari,* the Town argues: "Thus, the issue of a taking could not arise until

the [New Hampshire courts] had ruled on that issue." Opp. Br. at 6. But this Court has ruled the exact opposite:

> It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320 (1987).

As if the Questions Presented in the Petition were not enough, the Town's Opposition Brief now throws in another issue that begs for this Court's resolution. For the first time, in its Opposition Brief the Town now contends that a taking only could have occurred *after* the New Hampshire Supreme Court summarily affirmed that the Ordinance was "invalid, *ab initio.*" Opp. Br. 6, Section II. From the Town's perspective, no takings claim could have accrued when it actually enforced and applied the illegal Ordinance to deny Petitioner's their permits. Thus, the Town argues that Petitioners' pursuit of litigation up to the New Hampshire Supreme Court over the validity of the illegal Ordinance was a "normal delay" in the permit approval process. *First English,* 482 U.S. at 321. However, the "normal delays" suggested by *First English* pertain to ordinary administrative remedies in the land-use arena, specifically, "obtaining building permits, changes in zoning ordinances, variances, *and the like which are not before us.*" *Id.* (emphasis supplied.)

Now that the Town "likens" state court litigation to "normal" administrative delay, the majority opinion of the California Supreme Court in *Landgate, Inc. v. California Coastal Comm'n,* 953 P.2d 1188, 1195 (Cal. 1998), *cert. denied,* 525 U.S. 876 (1998), has been exported eastward, creeping into New Hampshire. In *Landgate*, a divided 4-3

panel decided that a property owner's pursuit of litigation in the state court system, challenging the validity of regulatory action, was merely a "normal part" of the development process and therefore was not a temporary taking under the Fifth Amendment.[2] Three dissenting justices, in two separate dissenting opinions, voiced sharp criticism against that result. Two of the *Landgate* dissenters pointed out that Justice Stevens, in his own *First English* dissent, "articulated the precise argument...that litigation over the validity of a land-use restriction is simply a 'normal delay' in the permit approval process and, therefore, cannot give rise to a temporary taking"—and moreover, that the majority opinion in *First English* "considered Justice Stevens' argument *and rejected it.*" 953 P.2d at 1206 (emphasis in original) (Justices Chin and Baxter, dissenting). A third dissenting justice in *Landgate* also rejected the notion that litigation over the validity of land-use decisions is a "normal" part of the process. He declared the *Landgate* majority's opinion "tendentious," and thought "[t]he precise issue has thus been considered and rejected by the [United States Supreme Court]." *Id.* at 1209-10 (Justice Brown, joined by Justice Baxter, dissenting).

Does the "normal delay" exception to takings liability really encompass litigation over the validity of a land-use regulation up and through the state court system? Respondent thinks yes. But the *First English* majority thought no, while dissenting Justice Stevens thought yes. The *Landgate* majority thought yes. And three *Landgate* dissenters thought no. Justice Brennan, whose writings are so influential in this area, would

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[2]The *Landgate* majority ruled: "[A] judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination [in the courts] does not constitute a per se temporary taking." 953 P.2d at 1203 (emphasis in original).

have thought no.[3] Lower court judges, understandably, are utterly confused.[4] Whatever the law is, this Court must state it.

If litigation over the validity of a land-use law is a "normal" part of the approval process, the law is as the Town and *Landgate* would have it, then when would a taking *ever* arise? Under that Carrollesque scenario, compensation would only become due after (1) litigation in state court over the validity of an ordinance is consummated, (2) the court invalidates that particular ordinance, (3) government ignores that court order, running the risk of contempt, and (4) *government continues to apply that regulation after its judicial invalidation.* Application of the Takings Clause would thereby "amount[] to a test of whether the [regulatory agency] has a stupid staff," (*Lucas v. South Carolina Coastal Council,* 505

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[3]See *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) (liability to pay just compensation for the time during which an invalid regulation is in effect "encourage[s] municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts").

[4]See, e.g., Jon Lycett, *Landgate, Inc. v. California Coastal Commission--Why Temporary Takings Law is "Screwed Up," 7 Hastings* W–N.W. J. Envtl. L. & Pol'y 55 (2000). The California cases alone are incoherent. Other decisions there have not followed the approach taken by *Landgate.* See, e.g., *Ali v. City of Los Angeles,* 77 Cal. App. 4th 246, 254-55 (2000) (affirming finding of regulatory taking requiring payment of compensation; refusing to apply *Landgate,* because it is "not a 'normal' delay in the process [where agency action] is so unreasonable from a legal standpoint as to be arbitrary"); *Healing v. California Coastal Comm'n,* 22 Cal. App. 4th 1158, 1171 n.7 (1994) ("summarily" rejecting the Coastal Commission's contention that delay suffered by plaintiff is "normal" and holding that the Commission "may be liable for a regulatory taking even if it ultimately issues a permit").

U.S. 1003, 1025 n. 12 (1992)), because government could easily circumvent the compensation remedy through "an exercise in cleverness and imagination." *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 841 (1987).

"Framing the issue as the [Town] would have us do here would be tantamount to accepting a categorical rule that precludes agency mistakes from ever amounting to a taking."[5] Respectfully, certiorari must be granted to address whether litigation over the validity of a regulation falls within the *First English* "normal delay" exception to a taking.

3. Petitioners did not "Waive" the *Penn Central* Argument.

Finally, the Town argues that *certiorari* should be denied because "Petitioners fail to cite the Penn Central case or its holding [before the New Hampshire Supreme Court]; therefore, any argument based on that case has been waived and is not properly before this Court." Opp. Br. at 6. True, Petitioners did not cite *Penn Central* in the state court proceedings, but they did cite *First English,* which in turn cites *Penn Central* (as well as Justice Brennan's plurality dissent in *San Diego Gas,* which cites *Penn Central.*) Moreover, at oral argument before the New Hampshire Supreme Court, on July 11, 2002, New Hampshire Justice Dalainis directly asked counsel of record for both parties whether *Tahoe-Sierra* was "dispositive" in the case at bench.[6] And *Tahoe-Sierra,* in turn, relies so heavily on *Penn*

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[5] *Manor v. Reisma*, 2003 WL 1224248, No. C.A. PC 89-2447 (R.I. Super. Feb. 24, 2003) at *11 - *12 (expressly rejecting analysis of *Landgate* majority, and following analysis of *Landgate* dissenting Justice Brown).

[6] In response, counsel for both Petitioners and Respondent stated that *Tahoe-Sierra* was not dispositive in the case at bench. Counsel for

Central to the point of homage. Takings claims under the United States and New Hampshire Constitutions were pled and briefed. Just because the New Hampshire Supreme Court failed to cite *Penn Central* in its decision does not mean that Petitioners waived the argument.

The New Hampshire Supreme Court's failure to conduct the ad hoc balancing test first enunciated in *Penn Central,* and reconfirmed in *Tahoe-Sierra, Palazzolo,* and as recently as last March in *Brown v. Legal Found. of Washington,* 538 U.S. ---, 123 S.Ct. 1406, 1417-18 (2003), is fairly in play.

[CONCLUSION PAGE FOLLOWS]

Petitioners reasoned that *Tahoe-Sierra* did not apply because the moratoria halting development in the Lake Tahoe basin were valid, while the Ordinance at issue here was "invalid, *ab initio.*" Petitioners have requested a transcript of the oral argument before the New Hampshire Supreme Court, and will expeditiously file a supplemental appendix with this Court once it is received.

CONCLUSION

Tahoe-Sierra emphasizes that "[c]onsiderations of fairness and justice" underlie the takings analysis. 535 U.S. at 333. It is neither fair nor just for municipalities to immunize themselves from takings liability when they fail to follow thei own laws and enforce illegal ones.

For the foregoing reasons, and for those stated in the underlying Petition, the writ for *certiorari* should be granted.

DATED: May 15, 2003

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